Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHELLE LONDON-MARABLE and FREDERICK C. MARABLE, husband and wife,

Petitioners,

v.

THE BOEING COMPANY, a Delaware corporation; DONALD J. MORRIS and JANE DOE MORRIS; SUE WALLACE and JOHN DOE WALLACE; CYNTHIA KOOPMAN and JOHN DOE KOOPMAN; VAUGHN PIRLO and JANE DOE PIRLO; JOSEPH TAYLOR and JANE DOE TAYLOR; BRADLEY PONTIOUS and JANE DOE PONTIOUS; ARTHUR E. McIRVIN and JANE DOE McIRVIN; DOES I through XX, BLACK CORPORATIONS A-L, WHITE PARTNERSHIPS M-Z,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the district court's grant of summary judgment in favor of The Boeing Company et al. (collectively, "Boeing" or "Defendants") on the Marables' claims brought under Arizona law for (1) breach of an employment contract; (2) constructive discharge and wrongful termination; (3) intentional infliction of emotional distress; and (4) loss of consortium.

Regarding the Marables' breach of employment contract claim, the Ninth Circuit's holding conflicts with the Arizona Supreme Court's holding in *Demasse v. ITT Corp.*, 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999), namely that whether employee manual policies and provisions become a part of the employment contract is a question of fact for the jury.

Regarding the Marables' constructive discharge and wrongful termination claims, the Ninth Circuit's holding disregards the record establishing that Michelle London-Marable's working conditions were so objectively difficult, unpleasant or outrageous that she was compelled to resign, and that she gave Boeing sufficient notice that she was resigning, all in accordance with A.R.S. §§ 23-1501 and 23-1502. The Ninth Circuit also imposed a time requirement upon Michelle that is not contained in the statutes.

Regarding the Marables' intentional infliction of emotional distress and loss of consortium claims, the Ninth Circuit's holding disregarded the record which supports a finding that these claims present a question of fact for the jury.

Five questions are presented:

1. Should the Marables' breach of contract, wrongful discharge, intentional infliction of emotional distress, and Plaintiffs' loss of consortium claims be remanded to the district court for a trial on the merits?

2. Did Defendant Boeing's "Mesa Management Memo" constitute an employment contract, or become a term or condition of her employment with Boeing?

3. Was Michelle constructively discharged, thereby giving rise to her wrongful discharge claim against Boeing?

4. Does the record support Michelle's intentional infliction of emotional distress claim?

5. Should plaintiffs' loss of consortium claim survive summary judgment?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit issued a Memorandum decision on November 19, 2009. The Ninth Circuit affirmed the June 20, 2008 decision of the United States District Court for the District of Arizona. *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A.R.S. § 23-1501

The public policy of this state is that:

1. The employment relationship is contractual in nature.

2. The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship. Both the employee and the employer must sign this written contract, or this written

contract must be set forth in the employment handbook or manual or any similar document distributed to the employee, if that document expresses the intent that it is a contract of employment, or this written contract must be set forth in a writing signed by the party to be charged. Partial performance of employment shall not be deemed sufficient to eliminate the requirements set forth in this paragraph. Nothing in this paragraph shall be construed to affect the rights of public employees under the Constitution of Arizona and state and local laws of this state or the rights of employees and employers as defined by a collective bargaining agreement.

3. An employee has a claim against an employer for termination of employment only if one or more of the following circumstances have occurred:

(a) The employer has terminated the employment relationship of an employee in breach of an employment contract, as set forth in paragraph 2 of this section, in which case the remedies for the breach are limited to the remedies for a breach of contract.

(b) The employer has terminated the employment relationship of an employee in violation of a statute of this state. If the statute provides a

remedy to an employee for a violation of the statute, the remedies provided to an employee for a violation of the statute are the exclusive remedies for the violation of the statute or the public policy set forth in or arising out of the statute, including the following:

(i) The civil rights act prescribed in title 41, chapter 9.

(ii) The occupational safety and health act prescribed in chapter 2, article 10 of this title.

(iii) The statutes governing the hours of employment prescribed in chapter 2 of this title.

(iv) The agricultural employment relations act prescribed in chapter 8, article 5 of this title.

All definitions and restrictions contained in the statute also apply to any civil action based on a violation of the public policy arising out of the statute. If the statute does not provide a remedy to an employee for the violation of the statute, the employee shall have the right to bring a tort claim for wrongful termination in violation of the public policy set forth in the statute.

A.R.S. 23-1502

A. In any action under the statutes of this state or under common law, constructive discharge may only be established by either of the following:

1. Evidence of objectively difficult or unpleasant working conditions to the extent that a reasonable employee would feel compelled to resign, if the employer has been given at least fifteen days' notice by the employee that the employee intends to resign because of these conditions and the employer fails to respond to the employee's concerns.

2. Evidence of outrageous conduct by the employer or a managing agent of the employer, including sexual assault, threats of violence directed at the employee, a continuous pattern of discriminatory harassment by the employer or by a managing agent of the employer or other similar kinds of conduct, if the conduct would cause a reasonable employee to feel compelled to resign.

B. As a precondition to the right of an employee to bring a constructive discharge claim against an employer pursuant to subsection A, paragraph 1 of this section, the

employee shall take each of the following actions before deciding whether to resign:

> 1. Notify an appropriate representative of the employer, in writing, that a working condition exists that the employee believes is objectively so difficult or unpleasant that the employee feels compelled to resign or intends to resign.
>
> 2. Allow the employer fifteen calendar days to respond in writing to the matters presented in the employee's written communication under paragraph 1 of this subsection.
>
> 3. Read and consider the employer's response to the employee's written communication under paragraph 1 of this subsection.

18 U.S.C. §§ 1341 and 2

Whoever, having devised or intending to devise any scheme or false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimidated or held out to be such counterfeit or spurious

article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §§ 1347 and 2

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

STATEMENT OF THE CASE

1. Michelle London-Marable asserts in this case that Boeing breached its employment contract with her, caused her to involuntarily terminate her employment, bringing about her constructive discharge, and intentionally inflicted upon her emotional distress and loss of consortium with her husband, Frederick Marable, all in violation of Arizona state law.

Michelle worked for Boeing for twenty-two years. In 1999, she became a data processor. She held that title through the end of her employment with Boeing in 2004. Even though her job description stated otherwise, Michelle's job required lifting heavy boxes, twisting and turning, squatting, lifting heavy boxes over her shoulder, sorting paper, and keying in data.

In February 2001, Michelle began treatment for severe abdominal pain. She underwent surgery, during which it was discovered that she suffered from a rirguirnal hernia. She was on a medical leave of absence from January 12, 2001 through June 25, 2001.

On June 26, 2001 Michelle filed a claim to receive short-term disability benefits from Aetna Insurance Company ("Aetna"). As part of that claim process, she completed a "STD Claim Questionnaire." The Questionnaire asked Michelle to describe her job duties, tasks and responsibilities. In the Questionnaire, Michelle disclosed to Aetna that her job consisted of heavy lifting and pushing, stacking heavy boxes and retrieving boxes from warehouse shelves. Michelle also disclosed that she had to "bend/stoop, reach above [my] shoulders, kneel, push and pull continuously, and stack boxes weighing twenty six to fifty pounds." She also disclosed that she was required to push a cart weighing fifty pounds or more. Based upon the Questionnaire, Michelle received short-term disability benefits from Aetna.

On Michelle's 20-year anniversary with Boeing, Pirlo, Koopman and Morris thought it might be fun to celebrate by playing "hangman" using the letters of Michelle's name. To Michelle, who is African American, this "game" represented a noose of fear — a noose representing lynching black people. This caused her to fear for her life, and feel as though she was in danger, and afraid to go home or go to sleep.

On October 9, 2002 Michelle underwent a second surgery for cholecystitis and a second rirguirnal hernia.

She took a medical leave for her second surgery from October 8, 2002 until November 11, 2002. When she returned to work, she was restricted by her doctors from lifting more than 25 pounds, turning, twisting, bending, squatting, and reaching over her shoulder. Twisting and turning caused her intestine to be shifted, which caused her pain.

On November 12, 2002, Michelle returned to Boeing because she needed to be on the payroll to continue her medical insurance and she hoped that Boeing and/or its managers would find her another job within the company. That same day, Michelle received a copy of a "Mesa Management Memo" that was distributed within Michelle's work group at Boeing. The Memo stated in relevant part:

> Keeping employees healthy and safe from work-related injuries is one of our priorities at Boeing Mesa. When an injury occurs, our goal is to return the injured worker to an optimum level of health and performance as quickly as possible. This may require finding a "light duty" placement for the employee while he is she is recovering from the occupational injury.
>
> I want to encourage all managers to find placements within their own departments for workers who have been hurt and are returning to the team. When that is not possible, ***Health Services will assist by seeking alternate work assignments for those employees***. To facilitate the return of

> injured employees, ***Health Services will maintain a list of available temporary job assignments***. Our goal is to return employees as quickly as possible to the workplace, even if that requires placing them in a "light duty" assignment. (Emphasis supplied.)

Eight days later, on November 20, 2002, Michelle began to experience severe pain in her leg and back, as well as shortness of breath. She called Defendant Morris and asked him to call the paramedics. Boeing medical staff arrived at Michelle's desk and helped her into a wheelchair to take her to the medical department. The paramedics were called, and they took Michelle to the hospital.

November 20, 2002 was the last day that Michelle worked at Boeing.

On December 2, 2002, Michelle reported to work, but Morris sent her home informing her that she had to leave because she could not do the required job duties with her medical restrictions.[1]

As of January 15, 2003, Michelle was restricted by her doctor indefinitely from repetitive twisting, turning, bending, squatting, or lifting 20 pounds or more. Even

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[1] The trial court found [c]o-defendant Morris, one of her supervisors, told Michelle that Boeing was working on finding her a suitable alternative job, "which she asserts was a lie." The only witness to provide sworn testimony in this case was Michelle. Michelle testified at her deposition that Morris threatened that she would be laid off if she did not continue to lift heavy boxes.

though Morris told Michelle that Boeing did not have a job for her to do, on January 15, 2003, she returned to work because she was running out of sick time and had no more vacation time.

When Michelle arrived at work, she went to Boeing's medical department to get her release paperwork, and then she went to her desk. She did not have instructions about what to do at her desk; she sat at her desk and cried. After an hour and a half to two hours, Morris and Koopman came to her desk and told her she had to leave. They informed her that with her medical restrictions, she could no longer perform her job. They escorted her to Boeing medical, where she was advised to see Boeing's psychiatrist. After speaking with employees from Boeing's human resources department, Michelle was escorted off of the premises by Morris and Koopman.

On February 28, 2003, in connection with the dispute process, Michelle submitted a letter to Boeing's Disability Service Center and described her job duties as follows:

> My occupation as a Data Processor Technician (1995-Present) is more than just a clerk stationary job function. Details of job functions: Preparing boxes for shipping and also receiving boxes from other departments to be keyed. It consists of heavy lifting, pushing a cart, stacking boxes 5 to 6 high. Sorting, twisting/turning, stooping, bending, reaching above shoulder, kneeling, pushing

> and pulling cart and chair. Lifting boxes 45-50 pounds and pushing and pulling cart 175 pounds or more on a continuous basis.
>
> Pick up twice a week from different buildings. Receiving data records from other resources to my work area and totes are placed on floors and tables, to be sorted, counted, boxed and keyed. Pick up data records at other buildings consists of reaching over should, kneeling, twisting/turning, pulling, bending, and placing data records on top and bottom onto a push cart, which has large totes of data records.
>
> Thereafter, collecting all data records, pushed cart throughout the building, Bending, stooping, twisting/turning, reaching, pulling and lifting totes onto a mobile cart for transport back to workstation.

Michelle also attached a copy of her June 26, 2001 STD Claim Questionnaire to the February 28, 2003 letter.

Respondents asserted that at the end of January 2003, several changes were made to Michelle's workstation to accommodate her medical restrictions. The trial court found that Michelle claimed she did not know whether any changes were made and Boeing did not submit any evidence in the record that Michelle's workstation was actually changed. However, in Michelle's February 28, 2003 letter, Michelle disclosed that when she returned to work on January 15, 2003 (only to be turned away by Morris and Koopman),

"[t]he [only] thing that did change was a new chair and table." Significantly, Boeing never offered Michelle, on January 15, 2003, or at any time thereafter a light duty job as mandated in the Memo, or as requested by Michelle.

In February 2003, Michelle called Boeing to get her leave of absence extended, and Boeing extended her leave for two months, and Michelle was informed that if she needed it extended further, she simply needed to call in again.

Sometime after January 23, 2003, Michelle asked Defendant Morris if Boeing had come to any resolution about moving her to a different job. Morris claimed that "he was working on it." In January or February of 2003, Michelle discussed returning to work with Boeing employee Miguel Gonzalez. He told her that she could only come back to work if she could lift heavy boxes. Michelle told him that she was not going to come back and lift heavy boxes.

In February 2003, Michelle applied for short- and long-term benefits with Aetna. This time Aetna asked Boeing management to describe Michelle's job duties and responsibilities within a "Physical Demands Analysis Worksheet." This document was prepared and completed by Morris.

Morris's summary of Michelle's job requirements was vastly different than Michelle's written summary, submitted nearly two years before with her June 26, 2001 STD Claim Questionnaire (which Aetna approved and paid at that time), or her more recent February 28,

2003 letter to Boeing's Disability Service Center. For example, Morris claimed that Michelle was merely required to "move records weighing one to five pounds each . . . and scan and place files and folders, weighing about six pounds each, into a storage box . . ."

Aetna denied Michelle short and long term benefits because Boeing claimed Michelle's job was "sedentary" and Michelle's doctor believed that Boeing had accommodated Michelle's condition, even though the only thing Boeing supposedly provided was a new chair and table, and Boeing told her to leave and not come back to her job.

On July 13, 2003, Michelle was determined to be totally disabled by Social Security Administration, effective October 20, 2002.

On August 18, 2003, Michelle called Boeing and asked if her medical leave could be extended through January 18, 2004. Her request was granted. Boeing extended the leave of absence again — on its own— through June 15, 2004.

On April 19, 2004 Michelle told Boeing employee Christine Fisher that she was resigning, and her reasons for resigning. Fisher asked Michelle to write a letter with an explanation of her reasons. On May 21, 2004 Michelle wrote a letter to Fisher that explained her reasons for resigning. In the letter, Michelle stated she had resigned because of her physical disability, mental stress, and because she was not able to perform the duties of her job. After she mailed in her May 21, 2004 letter, Michelle began receiving Boeing retirement benefits.

To this day, Michelle is totally disabled and unable to return to work.

2. On November 19, 2004 the Marables filed a six count Complaint against the Respondents, Aetna and Boeing Employee Benefits Plan Committee ("ERISA Defendants"). The ERISA Defendants filed two motions to dismiss, and the Complaint was later amended to largely clarify an ERISA count against the ERISA Defendants. All Defendants filed timely Answers.

On April 20, 2007, the ERISA Defendants filed a Motion for Summary Judgment. On November 13, 2007 the District Court dismissed the ERISA Defendants.

On January 7, 2008 the Boeing Defendants filed a Motion for Summary Judgment on the Plaintiffs' remaining claims. On June 23, 2008, the trial court granted the Boeing Defendants' motion for summary judgment, and dismissed the Marables' Complaint.

REASONS FOR GRANTING THE PETITION

All of the Marables' claims should have gone to the trier of fact. The trial court should have held that per the Arizona Supreme Court's decision in *Demasse v. ITT Corp.*, 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999), the Memo was an express promise by Boeing of continued employment. Alternatively, the *Demasse* court held that, in a general sense, whether employee manual policies and provisions become a part of the employment contract is a question of fact for the jury. When it comes to whether an employer has specifically promised job security or certain disciplinary procedures, these

questions are also reserved for the trier of fact. *Roberson v. Wal-Mart Stores, Inc.*, 202 Ariz. 286, 291, 44 P.3d 164, 169 (App. 2002).

Also, in accordance with A.R.S. §§ 23-1501 and 23-1502, the Ninth Circuit should have remanded Michelle's constructive discharge and wrongful termination claims to the district court. On April 19, 2004, she gave Boeing notice of her reasons therefore, and on May 21, 2004 resigned in writing, thereby meeting all statutory notice requirements under the applicable statutes. Finally, there are disputed issues of material fact as to whether Boeing and/or its managers intentionally inflicted emotional distress upon Michelle, and caused the Marables a loss of consortium, all in violation of Arizona law.

LEGAL ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ERRED WHEN IT FOUND THE MESA MANAGEMENT MEMO DID NOT CREATE A CONTRACUAL PROMISE, OR DID NOT MODIFY HER EMPLOYMENT CONTRACT WITH BOEING.

A.R.S. § 23-1501 provides in part:

The public policy of this state is that:

1. The employment relationship is contractual in nature.

> 2. The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship. Both the employee and the employer must sign this written contract, or this written contract must be set forth in the employment handbook or manual or any similar document distributed to the employee, if that document expresses the intent that it is a contract of employment, or this written contract must be set forth in a writing signed by the party to be charged. Partial performance of employment shall not be deemed sufficient to eliminate the requirements set forth in this paragraph.

Despite the foregoing statute, under Arizona law "the parties are free to create a different relationship beyond one at will "'and define the parameters of that relationship, based upon the totality of their statements and actions.'" *Demasse v. ITT Corp.*, 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999).

In *Demasse*, several former ITT employees brought a lawsuit against their employer, alleging they were laid off in breach of a contract provision requiring that layoffs be carried out according to seniority. The issues presented in *Demasse* derived from a 1989 handbook.

Like most employee handbooks, the 1989 ITT handbook provided that "nothing contained herein shall be construed as a guarantee of continued employment . . . ITT Cannon does not guarantee continued employment to employees and retains the right to terminate or layoff employees." *Demasse*, 194 Ariz. at 503. The 1989 ITT handbook also provided that "specific provisions of policies, rules, procedures and programs supersede[ ] the contents of this handbook," apparently allowing ITT to modify specific provisions through methods other than issuing a new handbook.

That is precisely what ITT did.

One of the provisions in the 1989 handbook called for layoffs to be made in reverse order of seniority. Yet, in 1993, ITT notified Demasse and other employees that its layoff guidelines for hourly employees would not be based on seniority but on each employee's "abilities and documentation of performance. Demasse and others were laid off in accordance with the 1993 modification.

Demasse sued in federal district court alleging he and others were laid off in breach of an implied-in-fact contract created by the pre-1989 handbook provisions requiring that ITT lay off its employees according to seniority. The trial court first determined whether an implied-in-fact contract had been created was a question of fact. *Demasse*, 194 Ariz. at 504. But the trial court also held that, even if an implied-in-fact contract had been created, only the provisions of the most recent handbook applied, thereby giving ITT the right to automatically and unilaterally modify the handbook, and that Arizona courts (but not the federal district court)

had previously determined continued employment alone was sufficient consideration to modify the handbook. *Id.* This latter issue was certified for resolution by the Ninth Circuit.

As stated earlier, A.R.S. § 23-1501, (1) states "The public policy in this state is that the employment relationship is contractual in nature." So, although complete at-will employment is for an indefinite term, and can be terminated at any time by either party for good or no cause at all, under Arizona law "the parties are free to create a different relationship beyond one at will "'and define the parameters of that relationship, based upon the totality of their statements and actions.'" *Demasse*, 194 Ariz. at 505, 984 P.2d at 1143. Moreover, Arizona recognizes that implied-in-fact contract terms may create an exception to is completely at-will employment. *Id.*, citing *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 376, 710 P.2d 1025, 1031. The employee overcomes the at-will presumption by establishing a contract term that is either expressed or inferred from the words or conduct of the parties. *Id.*, citing *Wagenseller*, 147 Ariz. at 381, 710 P.2d at 1036.

Next, the *Demasse* court observed: "When employment circumstances offer a term of job security to an employee who might otherwise be dischargeable at will and the employee acts in response to that promise, the employment relationship is *no longer at will* but instead is governed by the terms of the contract." *Demasse*, 194 Ariz. at 505, 984 P.2d at 1143. And, whether the employment contract is express or implied-in-fact is irrelevant — once the contract is

formed, a party may no longer unilaterally modify the terms of that relationship. *Demasse*, 194 Ariz. at 506, 984 P.2d at 1144.

Against this backdrop, the Ninth Circuit articulated several basic contract principles. First, it held that continued employment does not constitute consideration for the modification. *Id.* To manifest consent to a new contract term, the employee must first have legally adequate notice of the modification. *Demasse*, 194 Ariz. at 508, 984 P.2d at 1146. An employee must be informed of any new term, aware of its impact on the pre-existing contract, and affirmatively consent to it to accept the offered modification. *Id.* Next, the Ninth Circuit concluded that Arizona state courts had not recognized an employer's right to unilaterally modify a pre-existing implied-in-fact employment contract. *Id.* The court summarized: "[T]he contract rule is and has always been that one should keep one's promises."

Here, the Ninth Circuit did not properly apply *Demasse* to the facts of this case. Michelle testified at her deposition that she received a copy of the Mesa Management Memo ***eight days before*** she was injured on the job, and was taken off the job in an ambulance. The Ninth Circuit found the Memo was distributed to Boeing managers, within Michelle's work place, but Michelle did not receive the Memo directly. There is nothing in the record, by way of sworn deposition testimony, a declaration, or otherwise, that supports the Ninth Circuit's finding. Michelle's deposition testimony on this issue is uncontroverted in the record. At the very least, this issue should have been remanded to the trier of fact.

Also, regardless of how the Memo fell into Michelle's hands, by the time the Memo was distributed, Michelle had suffered significant injury, underwent surgery, and missed time from work, due to the twisting, turning, lifting and other strenuous activity required in her job. Boeing knew Michelle was eligible for "light duty" job placement, even before her permanent injury. Michelle knew the impact that the Memo had on her employment relationship. Michelle had constantly told Boeing management that she was suffering severe abdominal pain, and told Boeing "this job is killing me and I am dying. Will you please find me a job?" Michelle now understood that Boeing management had articulated an express undertaking to find her light duty work because she was in a category of workers covered by the Memo. She had been hurt on the job, and could no longer perform her job duties. Her doctors confirmed this. Boeing management told her she could not work in her department if she could not lift heavy boxes and twist and turn. The time had come for Boeing to find her another job. Instead of following its own management policy, Boeing turned a deaf ear to Michelle's plea.

The Ninth Circuit held Michelle unreasonably relied on the statement in the Memo that Boeing management "will assist by seeking alternative work assignments" for injured employees and "will maintain a list of available temporary job assignments" and that the Memo did not obligate Boeing to do anything. The Ninth Circuit claimed the memo was "neither a commitment nor a promise to [Michelle] to provide her with light duty assignments."

A statement is contractual only if discloses 'a promissory intent or [is] one that the employee could reasonably conclude constituted a commitment by the employer.'" *Demasse*, 194 Ariz. at 505, 984 P.2d at 1143. Here, Boeing's express undertaking could not be more explicit. The Memo stated Boeing "will assist . . ." and "will maintain a list . ." All of these statements were express undertakings and commitments by Boeing to help people like Michelle who had been injured on the job to find suitable alternative employment.

In addition to Boeing's words, its conduct (particularly the conduct of its management) imposed new, additional terms to Michelle's employment conduct. After Michelle was taken from Boeing's premises in an ambulance, on December 2, 2002, Michelle reported to work, but Morris sent her home informing her that she had to leave because she could not do the required job duties with her medical restrictions. Next, on January 15, 2003 she was told she could not return to work, lifting heavy boxes, because of her medical restrictions. After that, while Michelle was still not working, Morris told her that Boeing was "working" on finding her another job

Morris' empty promises to Michelle are consistent with the promises made to Michelle and all similarly situated Boeing employees in the Memo that, when an employee was injured on the job, the company's managers were supposed to find that employee "light duty" work so they could return and continue to be productive.

Instead of following through with finding Michelle light duty work, as Boeing and its managers promised to do, when Michelle was reaching her financial limit and had to file for short- and long-term disability benefits, Morris lied about Michelle's job duties and requirements, claiming that her work was "sedentary" and she was merely required to "move records weighing one to five pounds each . . and scan and place files and folders, weighing about six pounds each, into a storage box . . ."

Then, for more than a year, instead of firing her, because she supposedly could not do her job, and there apparently was no other job for her in a multi-billion, multi-national corporation like Boeing, Boeing "strung Michelle along," and misled her into thinking that it would do what it promised, back on November 12, 2002, and accommodate her medical situation. Michelle clearly accepted Boeing's promise to find her light duty work and accommodate her condition, but Boeing did not keep its promises.

On August 18, 2003, Boeing granted Michelle's request to extend her medical leave of absence through to January 18, 2004. On January 13, 2004, Boeing unilaterally extended Michelle's medical leave of absence, through to June 25, 2004. Finally, on April 19, 2004 Michelle notified Boeing she was to resigning and the reasons therefore and on May 21, 2004 she submitted her written resignation letter (at Boeing's request).

Implied-in-fact terms may be found in an employer's policy statements regarding job security or employee disciplinary procedures, such as those contained in

personnel manuals or memoranda. *Roberson v. Wal-Mart Stores, Inc.*, 202 Ariz. 286, 291, 44 P.3d 164, 169 (App. 2002). Whether there is a promise by Boeing of job security or certain disciplinary procedures implied-in-fact by an employer through its personnel manual or otherwise is a ***question of fact***. *Id.* Here, the Ninth Circuit should have construed the Memo as an explicit promise of job security for Michelle, such that if she went down with injury, she would not have to worry about losing her job. Instead, Boeing would find suitable alternative employment, and maintain a job listing for people like Michelle.

In sum, certiorari is warranted because the Ninth Circuit committed reversible error in not finding that the Mesa Management Memo was (a) an express undertaking, i.e. a promise to find Michelle a light duty job; and (b) an express term of Michelle's employment, which Boeing breached. Michelle's breach of contract claim should be remanded to the district court for a trial on the merits.

II. REVIEW IS WARRANTED BECAUSE THERE ARE TRIABLE ISSUES OF MATERIAL FACT AS TO WHETHER MICHELLE WAS CONSTRUCTIVELY AND WRONGFULLY DISCHARGED IN VIOLATION OF ARIZONA LAW.

A.R.S. 23-1502 provides:

> A. In any action under the statutes of this state or under common law, constructive discharge may only be established by either of the following:

1. Evidence of objectively difficult or unpleasant working conditions to the extent that a reasonable employee would feel compelled to resign, if the employer has been given at least fifteen days' notice by the employee that the employee intends to resign because of these conditions and the employer fails to respond to the employee's concerns.

2. Evidence of outrageous conduct by the employer or a managing agent of the employer, including sexual assault, threats of violence directed at the employee, a continuous pattern of discriminatory harassment by the employer or by a managing agent of the employer or other similar kinds of conduct, if the conduct would cause a reasonable employee to feel compelled to resign.

B. As a precondition to the right of an employee to bring a constructive discharge claim against an employer pursuant to subsection A, paragraph 1 of this section, the employee shall take each of the following actions before deciding whether to resign:

1. Notify an appropriate representative of the employer, in writing, that a working condition exists that the employee believes is

> objectively so difficult or unpleasant that the employee feels compelled to resign or intends to resign.
>
> 2. Allow the employer fifteen calendar days to respond in writing to the matters presented in the employee's written communication under paragraph 1 of this subsection.
>
> 3. Read and consider the employer's response to the employee's written communication under paragraph 1 of this subsection.

The record is undisputed that Michelle notified Boeing she was resigning, and the reasons why, on April 21, 2004. On May 20, 2004 she put those reasons in writing at Boeing's request.

Here, there was relevant, admissible evidence of intolerable working conditions, which were objectively difficult or unpleasant, and outrageous conduct on Boeing's part. For example:

- Michelle repeatedly told her employer that the job was "killing her" and Boeing and its managers would not do anything about it

- Michelle was threatened by Boeing managers that if she did not work through her injuries, she would lose her job.

- When Michelle was earning her degree, at the University of Phoenix, Co-defendants Taylor and Pontious told Michelle she "needed to quit going to school because she was embarrassing [her] co-workers" who did not have similar education.

Perhaps the most egregious incident was when Michelle was celebrating her 20th anniversary with the company. She was called into a room with several of her co-workers, including co-Defendants Pirlo, Koopman and Morris, and subjected to a game of "hangman" using the letters of her name. Michelle, who is African American, was humiliated, embarrassed and scared, and this caused her severe distress.

These incidents, among others chronicled in the record, in Michelle's deposition transcript, clearly satisfy either prong of A.R.S. § 23-1502.

Also, as concerns the second prong of the statute, Michelle resigned ***in writing*** on May 20, 2004, after giving Boeing at least fifteen (15) days' prior notice, on April 19, 2004. In her letter, Michelle summarized the intolerable working conditions she endured over the years as a Boeing employee. Boeing never responded to her letter within 15 days, as it was required to do under the statute.

The Ninth Circuit's ruling suggests that, under A.R.S. § 23-1502(A)(1), Michelle must give at least fifteen days' notice of her intent to resign, and that notice must be given at least fifteen days after the unpleasant or difficult working conditions because "she had not

interacted with anyone at Boeing or been subjected to any working conditions at Boeing for over one year." But the statute does not have such a spatial requirement. A.R.S. § 23-1502(A)(1) does not require that the "unpleasant or difficult working conditions" complained of occur within fifteen days of the offended employee's notice of intent to resign. Clearly, the Ninth Circuit has written into the statute a requirement that the Arizona legislature did not intend.

The Ninth Circuit correctly pointed out that under A.R.S. § 23-1502(A)(2) Michelle was not required to provide written notice "where the employer's conduct is outrageous." Again, however, the Ninth Circuit suggests that Michelle's claim is barred under this prong of the statute because of the length of time between when she was actually physically present at Boeing, and when she resigned. The circuit court declined to rule that her constructive discharge claim was ***time-barred*** (an argument made by Boeing) but simply held that summary judgment was appropriate.

The Ninth Circuit disregarded that, until May 20, 2004, Michelle ***was a Boeing employee***. Even after November 20, 2002, when Michelle left Boeing's premises in an ambulance, permanently disabled, she remained on Boeing's employment roster. Her right to notify Boeing management of its intolerable treatment of her, or outrageous conduct, did not dissipate simply because she was no longer physically present at the plant.

Michelle met all the statutory requirements f or constructive discharge because it violated A.R.S.

§ 23-1501 *et. seq.*, when it breached its promise to find her light duty work. Boeing's managers violated the covenant of good faith and fair dealing in Michelle's employment contract. Under Arizona law, every contract contains an implied obligation of good faith and fair dealing, namely that neither party will damage the rights of the other to receive the benefits flowing from the underlying contractual relationship. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 913 P.2d 1092 (1996). Here, Defendants repeatedly breached this covenant, in their dealings with Michelle directly, and with Aetna, when the Boeing Defendants misrepresented her job duties, which caused Aetna to deny Michelle short- and long term disability benefits.

Under Arizona law, Michelle's managers are personally liable for her wrongful discharge. In *Higgins v. Assmann Electronics*, 519 Ariz. Adv. Rep. 13, the Arizona Court of Appeals held that a supervisor may be held personally liable in a case where a company has vested its supervisor with day-to-day control over the company, and that supervisor has in fact exercised such control to harm another. Here, Michelle's supervisors controlled her employment destiny. They turned a deaf ear to her pleas for help, and her continued requests to be moved to another job, despite Boeing Management's clear written directive to do just that. Then, after Michelle could no longer physically perform her job, they refused to accommodate her medical condition, lied to her that Boeing was "working" on getting her another job, and lied to Aetna about her job duties and the

existence of changes to her work station[2], which caused Aetna to terminate her short- and long-term disability benefits.

Additionally, Boeing's managers violated several statutes, giving rise to Michelle's constructive and wrongful termination. Morris and other named defendants misrepresented to Aetna that Boeing had made changes to her work station, to accommodate her medical condition. The Defendants also misrepresented to Aetna that Michelle's job was "sedentary." They made these representations by mail, in violation of 18 U.S.C. §§ 1341 and 1342.

These representations were in connection with Michelle's claim for insurance disability benefits. Aetna denied those benefits. As a result, the Defendants' false representations caused the denial of her insurance benefits, in violation of 18 U.S.C. §§ 1347 and 2.

A wrongful termination plaintiff is entitled to all ordinary tort damages legally caused by the tort. *Higgins v. Assmann Electronics*, 519 Ariz. Adv. Rep. at 15. An element of damage is legally caused by a

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[2] Boeing produced no credible, admissible evidence of actual changes to Michelle's work station. Boeing attached an unsworn, unauthenticated copy of an interoffice email purportedly showing changes were made to Michelle's work area ***two days after*** she was told to leave. This is inadmissible hearsay, and the trial court should not have considered it on summary judgment. On the other hand, Michelle testified at her deposition ***under oath*** there were ***no changes*** to her work station, and her February 28, 2003 letter to Aetna, which is also in the record, confirms this as well.

tortious act if the tort is "a substantial factor in bringing about the harm" and the damages are closely connected to the tortious conduct so that they were reasonably foreseeable. *Id.*

In her resignation letter, to which Boeing never responded, she described in great detail how she was treated, and the damage caused by that treatment. At all times during her employment relationship with Boeing, Michelle put management on notice that her job was "killing her," and no one within the organization did anything about it. To the contrary, management acted in concert to deprive Michelle of the benefits of her employment relationship, including but not limited to, short- and long-term disability benefits.

Thus, certiorari is warranted because the Ninth Circuit imposed additional requirements that were not included in the applicable statute.

III. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT AND ARIZONA COURTS HAVE NOT ESTABLISHED ANY PARAMETERS AS TO WHAT IS "OUTRAGEOUS" OR "ATROCIOUS AND UTTERLY INTOLERABLE" CONDUCT SUPPORTING AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM.

Michelle states a claim for *intentional* infliction of emotional distress. The elements of this cause of action are conduct by the Defendant which is extreme and outrageous, intended to cause emotional distress or a reckless disregard of the near regard certainty that distress will result, and severe emotional distress must

indeed occur as a result of the Defendants' conduct. *Mintz v. Bell Atlantic Systems Leasing,* 183 Ariz. 550, 554, 905 P.2d 559, 563 (App. 1995). The "intent" element is satisfied if the defendant "desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct." *Id.* Although "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary [for] intentional infliction of emotional distress" (*Mintz),* Boeing's egrigious conduct toward Michelle is well chronicled in the record. Michelle told her managers before November 20, 2002 that her job was injuring her. She had been on disability for a good portion of 2001. She had just returned from a leave of absence, due to surgery, on November 20, 2002, when she began experiencing so much pain that she was taken away in an ambulance.

Michelle's uncontroverted testimony is that she was threatened with losing her job, if she did not continue to lift heavy boxes. Also, she was humiliated by her managers, in the presence of her co-workers. Her managers discouraged her from earning her secondary education degree. And, last but certainly not least, during her 20th anniversary "celebration," she was ridiculed, embarrassed and humiliated by the use of a "hang man" game at what was supposed to be a party.

After November 20, 2002, the wrongful treatment continued. She was told by Boeing management that she could not come back to work, under any circumstances. She asked co-Defendant Morris if Boeing had another job for her to do. He lied and said Boeing was "working" on finding her another job. Miguel

Gonzales told her that if she could not lift heavy boxes, she could not come back to work. Despite a written directive to all Boeing management to find "light duty" work for people like Michelle, no one in the company did anything to help her.

And it got worse.

When Michelle needed income, because she was not allowed to return to work, and Boeing refused to find another job for her to do, she applied for disability benefits with Boeing's insurer. Boeing's managers lied to Aetna about Michelle's job requirements, and working conditions. Aetna denied Michelle's claim. This is the same as Aetna saying "employee, you must return to work." Only the employer (Boeing) had nothing for Michelle to do.

Despite this, Boeing kept Michelle on its roster. Boeing extended her leave of absence, through to June 25, 2004. Finally, when Michelle realized she needed some income, from her twenty-plus years of service as a Boeing employee, she resigned so she could draw retirement benefits. She filed her lawsuit seven months later.

Against this backdrop, it is hard to fathom any conduct ***more outrageous*** or ***atrocious***, or more calculated to cause someone in Michelle's position emotional distress. All of these actions, taken individually or collectively, were carried out by Boeing management, by several managers who, based on Michelle's uncontroverted deposition testimony, did not care for her. The fact that there may have been

personality conflicts within Michelle's work environment does not give her supervisors the right to force her to work through debilitating personal injury, for fear of losing her job, breach its promises to her about finding her light duty work, and misrepresent the truth about her job and its conditions to others, in a way that they knew, or should have known, would have caused her substantial injury. Her claim for intentional infliction of emotional distress should not have been dismissed.

Based on the foregoing, certiorari is warranted to decide whether the undisputed facts of this case extend beyond the outer limits of "extreme and outrageous" conduct that would support a claim for intentional infliction of emotional distress under Arizona law.

IV. REVIEW IS WARRANTED BECAUSE PETITIONERS STATE A CLAIM FOR LOSS OF CONSORTIUM.

Michelle alleged that Respondents (a) required her to perform physical activities, which caused her pain and physical injury, and caused her to be hospitalized and undergo surgery; (b) continued to require her to perform physical activities, even after she told Boeing and its employees that the physical activities were causing her pain and physical injury, and (c) Boeing knew these physical activities were causing Michelle pain and injury.

She has also alleged emotional injury and corresponding damage against Respondents.

In *Barnes v. Outlaw*, cited by Respondents, the Arizona Supreme Court held that loss of consortium is a claim that can and should be resolved by **the jury.** "Fact-finders, usually jurors, can and should draw on their own experiences to distinguish between legitimate and fictitious claims, and are frequently called upon to do so." *Barnes*, 192 Ariz. at 286.

The claim is not just for physical injury, but emotional injury as well: "Clearly a marriage may be damaged by emotional trauma. Since loss of consortium is no longer exclusively based on a deprivation of services theory, we see no reason to require physical injury to one spouse before the other may bring a claim." *Id.*

In any event, the Arizona Supreme Court concluded: "Whether the marital relationship has been harmed enough to warrant damages in any given case is a matter for the jury to decide." *Id.*

It was premature for the Court to dismiss this claim. Michelle is married. Co-plaintiff Frederick Marable is her husband. The plaintiffs have alleged that she suffered physical and emotional harm caused by Respondents.

Both her and her husband alleged that, as a result of that harm, both of them suffered a loss of consortium.

This is a fact question for the jury, and this claim should not have been dismissed by summary judgment.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 19, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-17107

U.S.D.C. No. 04-CV-2611 (PHX) (MHM)

MICHELLE LONDON-MARABLE and FREDERICK MARABLE,

Plaintiffs-Appellants,

v.

THE BOEING COMPANY; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Mary H. Murguia, District Judge, Presiding

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix A

Submitted November 2, 2009**
San Francisco, California

Before: NOONAN and W. FLETCHER, Circuit Judges, and DUFFY,*** District Judge.

Appellants Michelle London-Marable and Frederick C. Marable (collectively, "Appellants") appeal from a judgment of the United States District Court for the District of Arizona granting summary judgment in favor of The Boeing Company et al. (collectively, "Boeing Defendants"). Appellants brought claims under Arizona law for: (1) breach of an employment contract; (2) constructive discharge and wrongful termination; (3) intentional infliction of emotional distress; and (4) loss of consortium.

We review a grant of summary judgment de novo. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). A motion for summary judgment may be granted only if the moving party shows "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). However, the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to defeat a properly supported motion for summary

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** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Kevin Thomas Duffy , United States District Judge for the Southern District of New York, sitting by designation.

judgment; rather, "there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

London-Marable alleges a claim for breach of employment contract based on the "Mesa Management Team" memorandum, a copy of which she received shortly before her last full day of work at Boeing. London-Marable argues that the memo contains an express promise to put her in a light duty position after her injury and that she relied on the statement in the memo that Boeing management "will assist by seeking alternative work assignments" for injured employees and "will maintain a list of available temporary job assignments." However, Boeing management is not *obligated* to do anything, as the memo simply identifies the "goals" and "priorities" of the management team. The memo is neither a commitment nor a promise to London-Marable to provide her with light duty assignments. *See Demasse v. ITT Corp.*, 194 Ariz. 500, 984 P.2d 1138, 1143 (Ariz. 1999). Additionally, there is no evidence in the record that Boeing engaged in any other conduct that would have given London-Marable a reasonable expectation that Boeing was contractually obligating itself to assign her light duty placement. *See Roberson v. Wal-mart Stores, Inc.*, 202 Ariz. 286, 44 P.3d 164, 169 (Ariz. Ct. App. 2002). Lastly, but significantly, London-Marable was not the intended recipient of the memo, as it was sent to the "Mesa Management Team," of which London-Marable was not a member. It ended up with London-Marable two weeks after its initial circulation.

London-Marable's estoppel argument is raised for the first time on appeal, so we decline to address it. *See Travelers Prop. & Cas. Co. of Am. v. Conocophillips Co.*, 546 F.3d 1142, 1146 (9th Cir. 2008).

London-Marable also alleges a claim for constructive discharge under the Arizona Employment Protection Act, A.R.S. §§ 23-1501, 23-1502. To succeed on this claim, the plaintiff-employee must show either (1) working conditions that are so objectively difficult or unpleasant that a reasonable employee would feel compelled to resign; or (2) outrageous conduct by the employer, such as sexual assault or threats of violence, that would similarly compel a reasonable employer to resign. A.R.S. § 23-1502(A)(1)-(2). Under the first provision, the plaintiff-employee must give at least fifteen days' notice of the *intent* to resign because of unpleasant or difficult working conditions. *See* A.R.S. § 23-1502(A)(1), (B). Notification by the plaintiff-employee is not required where the employer's conduct is outrageous under A.R.S. § 23-1502(A)(2).

Here, London-Marable provided Boeing with no advance notice of her *intent* to resign before she actually resigned. On April 19, 2004, London-Marable told Boeing employee Christine Fisher that she was resigning. Fisher asked London-Marable to write a letter with an explanation of her reasons for resigning, which London-Marable provided on May 21, 2004. The date of her resignation, however, remains April 19, 2004. Thus, in order for her constructive discharge claim to survive summary judgment, London-Marable must establish

that there is a genuine issue of material fact that Boeing 's conduct was so outrageous that a reasonable person would feel compelled to resign. The record supports the opposite conclusion.

It is undisputed that when London-Marable resigned on April 19, 2004, she had not interacted with anyone at Boeing or been subjected to any working conditions at Boeing for over one year. Further, in her May 21, 2004 letter, London-Marable admitted that her "physical disability and mental stress" were the "most obvious reason[s]" for her resignation and acknowledged that she was "no longer able to perform the duties required for the position [she] held when employed." Considering these facts and admissions, the district court properly granted summary judgment on London-Marable's constructive discharge claim. Because we find London-Marable was not constructively discharged, we do not reach her claim for wrongful termination.

London-Marable also made a claim against the Boeing Defendants for intentional infliction of emotional distress ("IIED"). Most of the conduct at issue is barred by the two-year statute of limitations for an IIED claim. *See Hansen v. Stoll,* 130 Ariz. 454, 636 P.2d 1236, 1242 (Ariz. Ct. App. 1981) (citing A.R.S. § 12-542(1)).

In any event, viewing the facts in the light most favorable to London-Marable, the conduct within the statutory period is simply not "extreme and outrageous"

as required by Arizona law. *See Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 905 P.2d 559, 562-63 (Ariz. Ct. App. 1995); *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 619 P.2d 1032, 1035 (Ariz. 1980). Much more egregious conduct is needed for such a claim. *See, e.g., Patton v. First Fed. Sav. and Loan Ass'n of Phoenix*, 118 Ariz. 473, 578 P.2d 152 (Ariz. 1978); *Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 650 P.2d 496 (Ariz. Ct. App. 1982). Therefore, the district court appropriately entered summary judgment in favor of the Boeing Defendants on Appellants' IIED claim.

Lastly, Appellants assert a claim for loss of consortium. This claim is derivative and can only exist if the directly injured spouse can establish the elements of an underlying cause of action. *Barnes v. Outlaw*, 192 Ariz. 283, 964 P.2d 484, 487 (Ariz. 1998). In light of the findings that London-Marable's underlying claims against Boeing do not survive summary judgment, the claim for loss of consortium was also properly dismissed.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED JUNE 23, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-04-2611-PHX-MHM

Michelle London-Marable and Frederick Marable, husband and wife,

Plaintiffs,

v.

The Boeing Company, a Delaware Corporation; et al.,

Defendants.

ORDER

The Plaintiffs, husband and wife, filed this suit on November 19, 2004. (Dkt. #1). The Defendants moved to dismiss various claims against them on May 3, 2005. (Dkt. #8). In a March 26, 2006 Order, the Court granted in part and denied in part the Motion. (Dkt. #15). Notably, the Court held that the Plaintiffs' Counts V and VI (fraud and negligent misrepresentation) were preempted by the Employee Retirement Income Security Act ("ERISA") because those claims had a "connection with or reference to" an employee benefit plan. The Court allowed the Plaintiffs to amend the Complaint to name the proper defendants and seek appropriate relief under ERISA. *Id.*

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The Third Amended Complaint named the appropriate defendants for each of the Plaintiffs' claims, dividing the claims into two categories: (1) claims applicable to the "Boeing Defendants," and (2) claims applicable to the "ERISA Defendants." (Dkt. #36). The ERISA Defendants moved for summary judgment on April 20, 2007 (Dkt. #63), which the Court granted. (Dkt. #102). The Court now turns to the Summary Judgment Motion filed by the Boeing Defendants. (Dkt. #84). After consideration of the pleadings and briefing submitted in this case, the Court issues the following order.

I. Standard of Review

A motion for summary judgment may be granted only if the moving party shows "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To defeat a motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party opposing summary judgment "may not rest upon mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R Civ. P. 56(e). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249.

Appendix B

II. Background

Michelle London-Marable ("the Plaintiff") worked for Boeing for twenty-two years. In 1999, she became a data processor. She held that title through the end of her employment with Boeing in 2004. Her job required lifting heavy boxes, twisting and turning, squatting, lifting over her shoulder, sorting paper, and keying in data.

In February 2001, the Plaintiff began treatment for severe abdominal pain. She underwent surgery, during which it was discovered that she suffered from rirguirnal hernia. She was on a medical leave of absence from January 12, 2001 through June 25, 2001. When the Plaintiff returned from her surgery, she was required to be on light duty for six weeks and could not lift more than ten pounds.

The Plaintiff underwent a second surgery on October 9, 2002 for cholecystitis and a second rirguirnal hernia. She took a medical leave for her second surgery from October 8, 2002 until November 11, 2002. When she returned to work, she was restricted by her doctors from lifting more than 25 pounds, turning, twisting, bending, squatting, and reaching over her shoulder. Twisting and turning caused her intestine to be shifted, which caused her pain. The Plaintiff was totally disabled as of October 9, 2002, and she has never recovered from that disability.

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The Plaintiff returned to Boeing on November 12, 2002 because she needed to be on the payroll to continue her medical insurance. She also attempted to return to work because she hoped that Boeing and/or its managers would find her another job within the company. Co-defendant Morris, one of her supervisors, told the Plaintiff that Boeing was working on finding her a suitable alternative job, which she asserts was a lie. The Plaintiff also asserts that she was threatened that she would be laid off if she did not continue to do her work.

On November 20, 2002, the Plaintiff began to experience severe pain in her leg and back, as well as shortness of breath. She called a supervisor, Defendant Morris, and asked him to call the paramedics.

Boeing medical staff arrived at the Plaintiff's desk and helped her into a wheelchair to take her to the medical department. There, a nurse put a hot towel on her stomach and left her and closed the door. An on-site doctor came in and allegedly advised the Plaintiff that she had "gas," and told her to see her primary care doctor. She asked the on-site doctor to call her husband.

Someone from Boeing called the Plaintiff's husband, Frederick Marable, and he arrived at Boeing shortly thereafter. The on-site doctor directed the Plaintiff's husband to take her to her primary care doctor. Marable began threatening the doctor and Boeing with a lawsuit, and so he was escorted from the premises. The paramedics were called, and they took the Plaintiff to the hospital.

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The Plaintiff returned to Boeing on December 3, 2002. Defendant Morris sent her home, informing her that she had to leave because she could not do the required job duties with her medical restrictions.

As of January 15, 2003, the Plaintiff was restricted by her doctor indefinitely from repetitive twisting, turning, bending, squatting, or lifting 20 pounds or more. Despite being told before returning to work that Boeing did not have a job for her to do, she returned to work. She testified at her deposition that she took it upon herself to return because she was running out of sick time and had no more vacation time.

When the Plaintiff arrived at work on January 15, she went to Boeing's medical department to get her release paperwork, and then she went to her desk. She did not have instructions about what to do at her desk; she sat at her desk and cried. After an hour and a half to two hours, supervisors (and co-defendants) Morris and Koopman came to her desk and told her she had to leave. They informed her that with her medical restrictions, she could no longer perform her job. They escorted her to Boeing medical, where she was advised to see Boeing's psychiatrist.

After speaking with employees from Boeing's human resources department, the Plaintiff was escorted off of the premises by Morris and Koopman. January 15, 2003 is the last day that she was physically present at Boeing.

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The Boeing Defendants assert that at the end of January 2003, several changes were made to the Plaintiff's workstation to accommodate her medical restrictions. The Plaintiff responds that because she was escorted off the premises and not permitted to return, she has no way of knowing whether any changes were made.

In February 2003, the Plaintiff called Boeing to get her leave of absence extended. It was extended for two months, and the Plaintiff was informed that if she needed it extended further, she simply needed to call in again.

Sometime after January 23, 2003, the Plaintiff asked Defendant Morris if Boeing had come to any resolution about moving her to a different job. Morris informed her that he was working on it. In January or February of 2003, the Plaintiff discussed returning to work with Boeing employee Miguel Gonzalez. He informed her that she could only come back to work if she could lift boxes. She told him that she was not going to come back and lift boxes.

As of February 2003, the Plaintiff was no longer working for Boeing or receiving any benefits. She could not perform any work at all as of July 2, 2003. On August 18, 2003, the Plaintiff called Boeing and asked if her medical leave could be extended through January 18, 2004. Her request was granted. Boeing extended the leave of absence again — on its own — through June 15, 2004.

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The Plaintiff resigned from Boeing on April 19, 2004. She spoke with Boeing employee Christine Fisher to tell her that she was resigning, and Fisher asked the Plaintiff to write a letter with an explanation of her reasons. The Plaintiff responded with a May 21, 2004 letter to Fisher that explained her reasons for resigning. She resigned because of her physical disability, mental stress, and because she was not able to perform the duties of her job. She did not resign until April 2004 because she was waiting to resolve her appeal to Aetna (the benefits Plan Administrator) regarding her short-term disability benefits. After she sent in her May 21, 2004 letter, the Plaintiff began receiving Boeing retirement benefits.

Shortly after sending her May 21, 2004 letter, the Plaintiff called Boeing security to arrange to pick up her belongings. She and her husband traveled to Boeing and picked up her personal effects, which had been packed in five boxes, from the main lobby.

The Plaintiff and her husband filed suit in November 2004, alleging breach of the employment agreement, wrongful termination, negligent or intentional infliction of emotional distress, and loss of consortium.

Appendix B

III. Discussion

A. Breach of the Employment Agreement (Count 1)

The Plaintiff, while conceding that an employment relationship is at-will under Arizona law, bases her breach of contract claim on the "Mesa Management Team" memorandum that she received a copy of shortly before being injured on the job. She asserts that the Memo contains explicit promises, and therefore became an express term of her employment. She cites to the language from which she infers promissory intent:

> Keeping employees healthy and safe from work related injuries is one of our priorities at Boeing Mesa. When an injury occurs, our goal is to return the injured worker to an optimum level of health and performance as quickly as possible. This may require finding "light duty" placement while he or she is recovering from the occupational injury.
>
> I want to encourage all managers to find placements within their own departments for workers who have been hurt and are returning to the team. When that is not possible, Health Services will assist by seeking alternate work assignments for those employees. To facilitate the return of injured employees, Health Services will maintain a list of available temporary job assignments. Our goal is to return employees as quickly as

> possible to the workplace, even if that requires placing them in a "light duty" assignment.

(Dkt. #91). The Plaintiff asserts that the language constitutes "an explicit, express term and condition of [her] employment," and as such, "must be strictly enforced by the Court." (*Id.*)

The Court does not find that the Memo contained any promises on which the Plaintiff could reasonably rely. It does not require Boeing to take any specific action; it merely states the company's "goals" and "priorities." When a statement merely describes the employer's policies, "it is neither a promise nor a statement that could reasonably relied upon as a commitment." *Demasse v. ITT Corp.*, 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999). The Plaintiff could not reasonably conclude that the Memo constituted a commitment by Boeing. *Id.*; *Roberson v. Wal-Mart Stores, Inc.*, 202 Ariz. 286, 291, 44 P.3d 164, 169 (Ariz. App. 2002).

The Plaintiff argues that summary disposition is inappropriate because "[w]hether there is a promise of job security or certain disciplinary procedures implied-in-fact by an employer through its personnel manual or otherwise is a ***question of fact***." (Dkt. #91). The Court does not find this to be a genuine issue of material fact that precludes summary judgment. "Only disputes over material facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986).

Even if the Plaintiff were to succeed in convincing the trier of fact that the Memo should be incorporated into the parties' employment agreement, the Court finds, as a matter of law, that it does not obligate Boeing to do anything. *Smith v. Melson, inc.*, 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983) ("The construction of a contract is a question of law where the terms of the agreement are plain and unambiguous."). The plain language of the Memo — using terms such as "one of our priorities," "goal," and "I want to encourage" — unambiguously establishes that the document recites the goals and aspirations for the Mesa Management Team, and could not constitute a promise on which the Plaintiff could rely. Furthermore, the Plaintiff does not appear to be the intended recipient of the Memo; it is therefore unreasonable to infer promissory intent to act in any particular way for the Plaintiff's benefit. Accordingly, the Court finds that summary judgment should be granted in favor of the Defendants on Count I.

B. Constructive Discharge/Wrongful Termination (Count II)

The Plaintiff asserts that she was constructively discharged on April 19, 2004 when she resigned from Boeing. She says that the record is replete with "relevant, admissible evidence of intolerable working conditions, which were objectively difficult or unpleasant, and outrageous conduct" on the part of her employer. (Dkt. #91). She notes, by way of example, that she repeatedly told her employer that the "job was

killing her"; she was threatened that if she did not work through her injuries, she would lose her job; when she was earning her degree, Defendants Taylor and Pontious told her that she needed to quit going to school because she was embarrassing her co-workers who did not have a similar level of education, and; some co-workers called her into a room and subjected her to a game of "hangman" using the letters of her name. (*Id.*)

In order to state a claim for constructive discharge under Arizona law, the Plaintiff must prove that her working conditions were so objectively difficult, or that the employer engaged in such outrageous conduct, that a reasonable employee would feel compelled to resign. A.R.S. § 23-1502(A)(1)-(B). The employee must also "[n]otify an appropriate representative of the employer, in writing, that a working condition exists that the employee believes is objectively so difficult that the employee feels compelled to resign or intends to resign." A.R.S. § 23-1502(B)(1). Notification is not required where the employer's conduct is sufficiently outrageous, such as when it involves sexual assault, threats of violence, or a continuous pattern of discriminatory harassment. A.R.S. § 23-1502(A)(2).

Here, the Plaintiff resigned with no notice on April 19, 2004. (Dkt. #85-4).[1] Therefore, for her claim of

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1. A May 21, 2004 letter in the record contains the subject line "Resigned position as Data Processor, April 19, 2004." The letter opens with, "I apologize for the delay in responding to your request for my reason for resigning from Boeing."

constructive discharge to survive, she must demonstrate that there is a genuine issue of material fact that her working conditions were so outrageous that a reasonable person would feel compelled to resign. Fed. R. Civ. P. 56(c); A.R.S. § 23-1502(A)(2).

When the Plaintiff resigned on April 19, 2004, she had been subject to no working conditions more than a year due to her medical leave of absence. Furthermore, she had had no interaction with anyone at Boeing for at least a year. The Court is unable to conclude, therefore, that her employer's conduct compelled her to resign on April 19, 2004. Moreover, the Plaintiff submitted a letter to Boeing on May 21, 2004, detailing the reasons for her resignation. (Dkt. #85-4). In it, she stated that she had various reasons ultimately leading to her resignation, the "most obvious reason" being her "physical disability and mental stress." (*Id.*)[2] In light of the fact that the Plaintiff had not been subject to any working conditions for more than a year, as well as the reasons she provided for her resignation, the Court cannot conclude that the Plaintiff was constructively discharged.

In light of the Court's finding that the Plaintiff was not constructively discharged, the Court does not reach the issue of whether her discharge was wrongful.

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2. The letter goes on to detail the Plaintiff's complaints that the managers failed to find her a suitable alternative job when she returned from medical leave, as well as her complaints of discrimination and racism. (*Id.*)

Appendix B

C. Negligent and Intentional infliction of Emotional Distress (Count III)

1. Negligent Infliction of Emotional Distress

The Plaintiff concedes that her negligent infliction of emotional distress claim is preempted under Arizona's Workers' Compensation laws. (Dkt. #91).

2. Intentional Infliction of Emotional Distress

The Plaintiff acknowledges that "it is extremely rare to find conduct in the employment context" that is sufficiently outrageous to support a claim for intentional infliction of emotional distress ("IIED"). (*Id.*); *Mintz v. Bell Atl. Sys. Leasing, Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (1995). She also agrees that some of the conduct about which she complains occurred outside of the statutory limitations period, which in Arizona is two years. (Dkt. #91). She asserts, however, that the outrageous conduct at issue here is sufficiently documented in the record to support her claim, and is viable despite the two-year limitations period under the "continuing violation doctrine."

Under the continuing violation doctrine, a series of separate acts collectively constitute one unlawful employment practice. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 103 (2002). It does not matter if some of the component acts fall outside the statutory time period; as long as "an act contributing to the claim occurs within the filing period, the entire time

period of the hostile environment may be considered for purposes of determining liability." *Id. National Railroad,* however, addressed a claim under Title VII, and not a claim for IIED. Extreme and outrageous acts comprising a claim for IIED have been held to constitute separate and distinct torts, and *not* a continuing violation. *Franklin v. City of Phoenix,* No. CV-06-02316, 2007 WL 1463753, at *2 (D. Ariz. May 17, 2007); *Floyd v. Donahue,* 186 Ariz. 409, 414, 923 P.2d 875, 880 (Ariz. App. 1996). Accordingly, acts occurring outside the limitations period cannot support the Plaintiff's claim of IIED.

The Plaintiff sets forth the following acts within the limitations period that support her IIED claim:

> 1) She was told by Boeing management that she could not come back to work under any circumstances;
>
> 2) Despite a clear directive to all Boeing management to find "light duty" work for people like the Plaintiff, no one in the organization did anything to help her;
>
> 3) Boeing lied to Aetna about the job and the Plaintiff's working conditions;
>
> 4) Boeing extended her leave of absence through June 25, 2004.

(Dkt. #91). She asserts that "it is hard to fathom any conduct more outrageous or atrocious."

Appendix B

The question for the Court when considering a motion for summary judgment is whether there is any evidence "upon which a jury could properly proceed to find a verdict for the party producing it." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). The inquiry requires the Court to make the initial determination of whether the evidence "is so one-sided that one party must prevail as a matter of law." *Id.* at 252. The Court finds here that the evidence provided by the Plaintiff for her IIED claim could not support a jury verdict, and accordingly, grants summary judgment in favor of the Defendants on Count III for the following reasons.

The Plaintiff agrees that she was totally disabled as of October 9, 2002. Accordingly, Boeing's refusal to allow the Plaintiff to return to work cannot constitute the basis for her IIED claim. A claim for IIED requires the defendant to have (1) engaged in conduct that was extreme and outrageous, (2) the defendant to have intended to cause emotional distress or to have recklessly disregarded the near certainty that such distress would result, and (3) the conduct must have actually caused severe emotional distress. *Ford v. Revlon*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987). The Court is unable to conclude that preventing the Plaintiff from returning to work amounts to IIED.

The Plaintiff's claim that Boeing refused to find her light duty work is similarly not actionable under a theory of IIED. As discussed previously, Boeing was not contractually obligated to find the Plaintiff an alternative assignment. The Court finds that the failure to do so

does not constitute the type of extreme and outrageous conduct that the tort laws were designed to prevent or recompense.

As set forth in the Court's March 26, 2006 Order, any claims for fraud or negligent misrepresentation relating to an employee benefit plan are preempted by ERISA. (Dkt. #15). The Plaintiff has already had the opportunity to assert those claims against the appropriate Defendants in the context of her ERISA claims, and it appears she did not do so.[3] (*See* Response to ERISA Defendants' Motion for Summary Judgment, Dkt. #68 (asserting only a claim for failure to comply with ERISA's procedural requirements)).

Finally, the Court is unable to conclude that the extension of the Plaintiff's leave of absence amounts to extreme and outrageous conduct. The Plaintiff has not put forth any credible evidence to suggest that extending the leave was intended to cause emotional

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3. Furthermore, even if the Plaintiff had properly asserted these claims against the Defendants, the Court cannot conclude that such conduct would amount to fraud or negligent misrepresentation. In order to have qualified for short term disability benefits, the Plaintiff must have been unable to perform her duties as a Data Processor for *any* supervisor or employer. (*See* Order granting ERISA Defendants' Motion for Summary Judgment, Dkt. #102). Because Aetna defined "occupation" generally, rather than looking to the specific requirements imposed by the Plaintiff's employer, it would be legally irrelevant that the Defendants misrepresented the level of physical demand required.

distress, or that anyone at Boeing "recklessly disregarded the near certainty that such distress would result." Furthermore, there is no credible evidence that Boeing's conduct in this regard actually caused emotional distress, much less *severe* emotional distress.

The Court fords that none of the grounds advanced for the Plaintiff's claim of IIED could support a jury verdict in her favor. *Anderson*, 477 U.S. at 251. Accordingly, summary judgment is granted in favor of the Defendants.

D. Loss of Consortium (Count IV)

Loss of consortium is a derivative claim that can exist only once the directly injured spouse establishes all of the elements of the underlying cause of action. *Barnes v. Outlaw*, 192 Ariz. 283, 286, 964 P.2d 484, 487 (1998). In light of the foregoing rulings, Plaintiff Frederick Marable's loss of consortium claim cannot survive summary judgment.

IV. Conclusion

The Plaintiffs have failed to demonstrate a genuine issue of material fact precluding summary judgment on any of their claims. Fed. R. Civ. P. 56(c).

Accordingly,

IT IS ORDERED granting summary judgment in favor of the Defendants on all claims against them. (Dkt. #84).

IT IS FURTHER ORDERED directing the Clerk to enter judgment accordingly.

DATED this 20th day of June, 2008.

s/ Mary H. Murguia
Mary H. Murguia
United States District Judge